A

ASM DEVELOPMENT SDN BHD

v.

HIJJAS KASTURI ASSOCIATES SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ZALEHA ZAHARI JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-02-1139-04]

C

17 DECEMBER 2008

CIVIL PROCEDURE: *Pleadings - Amendment of statement of claim - Principles applicable - Whether amendments would change suit into one of different character - Delay - Whether amendments material and*

D

relevant - New cause of action - Alternative remedy - Issue of election - Exercise of court's discretion

CIVIL PROCEDURE: *Amendment - Statement of claim - Principles applicable - Whether amendments would change suit into one of different*

E

character - Delay - Whether amendments material and relevant - New cause of action - Alternative remedy - Issue of election - Exercise of court's discretion

The plaintiff/respondent *vide* summons in chambers sought an order to amend its statement of claim dated 1 April 2003

F

('original statement of claim') as well as to include an English version of it. The Senior Assistant Registrar allowed the plaintiff's application and on appeal by the defendant/appellant to the judge in chambers, the High Court judge ('judge') dismissed the appeal and affirmed the Registrar's decision. The defendant appealed,

G

contending that the judge had erred in allowing the application for amendment since, on the facts and circumstances of this case, there was no basis for the exercise of the court's discretion in the plaintiff's favour.

H

Held (dismissing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) From the grounds of decision, it was evident that the judge had examined carefully each and every one of the proposed

I

amendments, and was satisfied that they would not change the suit into one of a different character. The plaintiff's claim in the original statement of claim was for professional fees for a certain project, and the new alternative claim remained that

of professional fees for the same project and arose from the same contract. The amendments sought were based on existing facts that were substantially the same as in the original claim. The judge had not erred in accepting the explanation, on the facts, for the delay when allowing the proposed amendments. The proposed amendments clearly clarified the relevant facts that would enable the issues to be determined by the court and were certainly material and relevant as a response to the defendant's statement of defence; they were not futile amendments. The amended statement clarified and elaborated the original grounds and, instead of causing prejudice to the defendant, was of benefit to the defendant. The defendant's objection that the amendments resulted in the introduction of a new cause of action was, on the facts, misconceived since the plaintiff was merely seeking to introduce a new alternative remedy for damages for breach of contract. On the allegation by the defendant that the plaintiff had abandoned its claim due to the issue of election, this court was of the view that the plaintiff could put forward alternative remedies and need only make an election at the point of judgment. (paras 17, 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden melalui saman dalam kamar menuntut sesuatu perintah untuk meminda pernyataan tuntutannya yang bertarikh 1 April 2003 ('pernyataan tuntutan asal') dan juga untuk memasuki satu versi berbahasa English pernyataan itu. Penolong Pendaftar Kanan membenarkan permohonan plaintif dan atas rayuan oleh defendan/perayu ke hakim dalam kamar, hakim Mahkamah Tinggi ('hakim') menolak rayuan itu dan mengesahkan keputusan Pendaftar tersebut. Defendan merayu, dengan menghujah bahawa hakim telah khilaf dalam membenarkan permohonan untuk pindaan kerana, berdasarkan fakta dan keadaan kes ini, tiada asas bagi menggunakan budi bicara mahkamah untuk menyebelahi plaintif.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Memandangkan alasan-alasan keputusan, ia jelas bahawa hakim telah mempertimbangkan setiap satu dan semua pindaan yang dicadangkan, dan telah berpuashati bahawa mereka tidak akan mengubah guaman itu kepada satu guaman yang sifat berlainan. Tuntutan plaintif dalam pernyataan tuntutan asal

ialah untuk bayaran profesional bagi sesuatu projek, dan tuntutan baru yang alternatif masih merupakan untuk bayaran profesional bagi projek yang sama dan berbangkit dari kontrak yang sama. Pindaan yang dituntut berasaskan fakta-fakta yang wujud yang secara substantif sama dengan yang terdapat dalam tuntutan asal. Hakim tidak khilaf menerima penjelasan, atas fakta, yang menerangkan kelewatan itu apabila membenarkan pindaan yang dicadangkan. Pindaan yang dicadangkan jelas menjelaskan fakta-fakta yang relevan yang akan membolehkan isu-isu dapat ditentukan oleh mahkamah dan sememangnya material dan relevan sebagai respons kepada pernyataan pembelaan defendan; mereka bukan pindaan yang tidak berguna. Pernyataan yang dipinda itu menjelaskan dan menghuraikan alasan-alasan yang asal dan, dan sebalik dari menyebabkan prejudis kepada defendan, berfaedah kepada defendan. Bantahan defendan bahawa pindaan itu akan mengakibatkan timbulnya suatu kausa tindakan baru merupakan satu tanggapan salah kerana plaintif hanya ingin memperkenalkan suatu remedi alternatif bagi pemungkiran kontrak. Berkenaan aduan oleh defendan bahawa plaintif telah meninggalkan tuntutannya disebabkan isu pemilihan, mahkamah ini berpendapat bahawa plaintif boleh mengemukakan remedi-remedi alternatif dan hanya perlu membuat pemilihan pada masa penghakiman.

Case(s) referred to:

Bukit Waha Quarry Sdn Bhd v. Teguh Permata Sdn Bhd [2000] 1 CLJ 781 HC ***(refd)***

Ketteman & Ors v. Hansel Properties Ltd & Ors [1987] AC 189 ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 10(1), (2), O. 20 r. 5(1), (2)

For the appellant - Dato' RR Sethu; M/s RR Sethu

For the respondent - Tunku Alina Alias; M/s Wong Lu Peen & Tunku Alina

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-22-375-2003]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] The plaintiff (respondent in this appeal) *vide* summons-in-chambers filed on 16 April 2003 sought an order to amend their statement of claim dated 1 April 2003 ("the original statement of claim") as well as to include an English version of it. The senior assistant registrar (SAR) allowed the plaintiff's application. On appeal to the judge-in-chambers, by order dated 12 October 2004, the High Court Judge dismissed the defendant's (the appellant in this appeal) appeal with costs and affirmed the SAR's decision.

[2] On 18 January 2007 we affirmed the High Court Judge's decision and dismissed the defendant's appeal. Our reasons are as follows:

[3] The plaintiff's application to amend was made pursuant to O. 20 r. 5(1), (2) and O. 18 r. 10(1) and (2) of the Rules of the High Court 1980 ("the Rules"). In an application such as this it was incumbent upon the plaintiff to set out cogent reasons in their supporting affidavit for the court to exercise its discretion in their favour. The reasons advanced by the plaintiff which the High Court Judge accepted warranting the exercise of the court's discretion in their favour were these.

[4] The plaintiff claimed that their records were not complete when the original statement of claim was filed on 1 April 2003. The subject matter of the suit, Bandar Tasik Selatan Phase 8 Project ("the project") had been abandoned in 1998. Most of their personnel who had handled the project had left them. Their documentation had also not been properly kept. Many of the documents and files were misplaced and could not be located.

[5] The plaintiff's solicitors averred that after the defendant served their bundle of documents, and upon perusal of the same, they sighted many relevant documents which documents they were unable to locate. They realized many relevant facts had not been pleaded in the original statement of claim. The plaintiff was of the view that the defendant would not be prejudiced as the need to move the amendments arose out of documents which had been in the defendant's possession at all times. The plaintiff was of the view the proposed amendments was not prejudicial to the defendant as the facts pleaded were within the defendant's knowledge. Any prejudice can be compensated by costs.

[6] The proposed amendments would not change the suit into one of a different character. The plaintiff's claim in the original statement of claim dated 1 April 2003 was for professional fees for the Bandar Tasik Selatan Phase 8 Project. The new alternative claim sought to be introduced remains that for professional fees for the same project. Both arises from the alleged breach by the defendant of the same contract.

[7] The application to amendment is made *bona fide* and filed at the earliest possible time. The factual position is that the defendant was unhappy as the plaintiff was relying on the defendant's documents in moving this application to amend.

[8] On the defendant's contention that the amendments were "futile", the plaintiff's counsel argued that the defendant's counsel was confused between election of remedies and election of inconsistent rights. A plaintiff can put forward alternative remedies and need only make an election at the point of judgment.

[9] In the argument before us, the appellant's counsel submitted that the plaintiff ought to have ascertained and located all of their documents before commencing proceedings against the defendant. The plaintiff should have made a disclosure of documents in their affidavit verifying the list of documents. The breach of contract claim was included in the plaintiff's reply dated 11 July 2003 to the defence where express reference was made to a 'contractual relationship' and repudiation. According to the appellant's counsel the plaintiff lacks *bona fides* in claiming that they "discovered" the claim in contract after the discovery process. The plaintiff had not in their supporting affidavit identified which of the documents in the defendant's list which jolted them from their slumber. He was of the view that the plaintiff's reliance on the defendant's list of documents was misplaced.

[10] The proposed amendment to paras 32 and 33 result in the introduction of a new cause of action of a claim in contract and the existing claim of quantum meruit as an alternative. The appellant submitted that the new cause of action for breach of contract is barred by limitation and does not arise out of the facts as pleaded. The breach of contract is founded on an alleged repudiation by letter dated 25 March 1988 that the plaintiff had accepted the repudiation. If one were to consider the date of the application (14 April 2004) more than six years had lapsed and limitation had accordingly set in.

[11] Whilst accepting that quantum meruit has often been interchangeably referred with "quasi contract", the appellants' counsel argued that there is another special application of quantum meruit, that concerned with damages on a breach of contract. He was of the view that the consequence of the plaintiff's suit in quantum meruit instead of contract was an election to rely on a quasi contract and an abandonment of the claim in contract. He submitted that where a party is entitled to two inconsistent rights the choice of one is an abandonment of the other. Once that election is made and communicated (by the issue and the service of the original claim) the election has become final and irreversible. The defendant had expressly raised abandonment by election in the defence to which there was no answer.

[12] There is accordingly no basis for the exercise of the court's discretion in the respondents favour. The judge erred in allowing the application for amendment. The court was urged to allow the defendant's appeal with costs.

Decision

[13] The principles on which courts exercise its discretion whether to allow or refuse an application to amend are well settled. An amendment would be allowed where the purpose of the amendment would result in the true issues between the parties to be determined. The amendments must not cause injustice to the other party/parties. There is no injustice to the other party if he can be compensated by appropriate orders as to costs. (per Lord Brandon in *Ketteman & Ors v. Hansel Properties Ltd & Ors* [1987] AC 189 at p 212.

[14] It should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them. It is not the function of the court to punish parties for mistakes which have been made in the conduct of their cases by deciding otherwise that in accordance with their rights. However blameworthy may have been a party's failure to plead the subject matter of a proposed amendment, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party.

[15] Whether it would be unjust to grant leave to amend required a balancing of the applying party's need to amend and the prejudice to the opposing party's interest. 'Prejudice' in this context, is whether the defendant in this case will or may have difficulty in defending the claim, specifically at the trial. For any relevant prejudice to be found it must constitute prejudice resulting from the amendment, either in the sense that the defendants, in reliance on the claim originally made, altered their position so as to make it more difficult to defend the new claim now made.

[16] The Federal Court in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 held whether there would be injustice would depend on three questions being answered in the affirmative. The application was *bona fide*. Delay in making application is not *bona fides*. Any prejudice caused to the other side can be compensated by costs. The amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (See *Bukit Waha Quarry Sdn Bhd v. Teguh Permata Sdn Bhd* [2000]1 CLJ 781).

[17] From the grounds of decision it is evident that the High Court Judge had examined carefully each and every one of the proposed amendments. The judge was satisfied that the proposed amendments will not change the suit into one of a different character. The plaintiff's claim in the original statement of claim was for professional fees for the project, and the new alternative claim sought to be introduced remain that of professional fees for the same project and arises from the same contract. The amendments sought are based on existing facts which are substantially the same facts as the original claim.

[18] The learned judge accepted the explanation given by the plaintiff that the proposed amendments arose out of the documents produced by the defendant in the exchange of documents exercise. The defendant's documents filled up the missing pieces and the defendant would not be prejudiced as these documents had been in their possession at all times. On the allegation of delay, the judge held that a delay of about four months from the date of exchange of documents (early December 2003) to the date of filing of the application to amend was not inordinate. The plaintiff's explanation of many employees involved in the project and the fact that many had resigned since the

abandonment of the project, and inability to locate the files and documents were good reasons why the proposed amendments could not be filed earlier. A

[19] Upon examining the proposed amendments in detail the High Court Judge was of the following view: the new paras 3 to 5 are facts referred to in brief in para 3.3 of the defence. The new para 7 is also a fact referred to in para 3.2 of the defence. The new para 10 refers to a fact that was previously mentioned in the original para 5 of the statement of claim, and also referred to in paras 6.4 and 6.7 of the defence. The new para 14 is referred to in paras 7.1 and 7.2 of the defence. The new paras 16, 17 and 18 contain facts referred to in paras 6.6 and 6.7 of the defence. The new para 19 is referred to in paras 21.2 and 21.3 of the defence. The new paras 22 to 27 are facts referred to in paras 12.1 and 12.2 of the defence. The amendments to paras 11 and 12 are for tidying up purposes. B C D

[20] The proposed new paras 21, 22, 28 and 29 were relevant and has been pleaded in the statement of claim due to plaintiffs' lack of documentation and records. Additionally, the new para 22 seeks to correct the position caused by a departure in pleadings in para 23 of the reply dated 11 June 2003. E

[21] As to new paras 32 and 33 of the statement of claim, the defendant's objection that the amendments result in the introduction of a new cause of action would only apply to the amendments in paras 32 and 33, and not to the other amendments. He was of the view that the objection that the plaintiff is introducing a new cause of action is misconceived as the plaintiff was merely seeking to introduce a new alternative remedy for damages for breach of contract, not a new cause of action. His analysis was that the amendments which the plaintiff was seeking were based on existing facts which are substantially the same facts as the original claim. F G

[22] We are of the view the learned judge had applied the correct principles and agree with his views. We see no reason for interfering with the exercise of his discretion. We are in agreement that the plaintiff had produced sufficient, material and cogent reasons as set out in the supporting affidavits for the proposed amendments. The judge had not erred in accepting the explanation for the delay when allowing the proposed amendments. The H I

A proposed amendments clearly clarifies the relevant facts to enable the issues to be determined by the court and certainly material and relevant as a response to the defendant's statement of defence dated 11 June 2003. We agree they are not futile amendments. The amended statement clarified and elaborated the
B original grounds, and instead of causing prejudice to the defendants, were of benefit to the defendants. We are of the view that a plaintiff can put forward alternative remedies and need only make an election at point of judgment.

C **[23]** For these reasons the High Court Judge's decision dated 12 October 2004 was affirmed. The appeal is dismissed with costs. The deposit to the respondent to account of taxed costs.

D

E

F

G

H

I